Supreme Court, U.S.
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No. 99 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JEANNE S. WOODFORD, Acting Warden, California State Prison at San Quentin, *Petitioner*,

v.

FERNANDO EROS CARO, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
DANE R. GILLETTE
Senior Assistant Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6202
Fax: (415) 356-6486
Counsel for Petitioner

1888
f.o.

(CAPITAL CASE)

QUESTION PRESENTED

Whether the standard of *Strickland v. Washington* 466 U.S. 668 (1984) requires reversal of a death sentence because trial counsel did not investigate a mental defense to which he was not alerted by licensed mental state experts whom counsel consulted and called to testify at trial.

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

FERNANDO EROS CARO, *Respondent*.

Jeanne S. Woodford, Acting Warden, California State Prison at San Quentin [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The amended opinion of the Court of Appeals, App. A at 1-25, is reported at 165 F.3d 1223 (9th Cir. 1999). The order of the Court of Appeals denying rehearing and the suggestion for rehearing en banc, App. B at 26-27, is unreported. The order of the District Court granting the State's motion for summary judgment and denying habeas corpus relief, App. C at 28-71, is unreported.

STATEMENT OF JURISDICTION

The order of the Court of Appeals denying a timely petition for rehearing was entered on March 17, 1999. App. B. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On the evening of August 20, 1980, respondent Fernando Caro [hereafter Caro] shot 15 year old Mark Hatcher in the face as Mark and Mary Booher, his 15 year old cousin, rode their bicycles in an orchard near Mark's home in rural Fresno County. Caro then fled in a pickup truck with Mary and the bicycles. Mary's body was found a few miles away in an orange grove on August 25. She had been shot in the head. The bicycles were abandoned in an irrigation canal.

While escaping with Mary, Caro struck another car but failed to stop. The owner of the car and his friend gave chase and Caro eventually pulled over. After allowing the men to approach as he begged them not to hurt him, Caro suddenly displayed his gun and shot the men. Both survived, but one was left functionally blind in one eye.

Caro subsequently hid his truck and altered his facial appearance. The weapon used in the crimes belonged to his girlfriend.

Caro was represented at trial by the Fresno County Public Defender's Office.[1] Counsel had Caro examined by at least four mental health experts. No expert found evidence of organic brain defect or suggested that further tests be conducted. One expert observed that Caro's "mental processes were quite efficient and effectively manifested by him." ER 6D:1447.[2] The same expert later testified that Caro was highly motivated and cooperative during the psychological testing, RT 4906, and described Caro as having "significantly above average intellectual ability." RT 4907.

At trial Caro's guilt defense consisted primarily of exposing discrepancies in the prosecution's case and attacking the sufficiency of the evidence on various counts.[3] The jury convicted Caro of two counts of first degree murder, kidnapping, and two counts of assault with intent to commit murder. They also found true a multiple murder special circumstance, thus making Caro eligible for the death penalty.

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1. The case was eventually tried in Santa Clara County on a change of venue.

2. ER designates portions of the federal habeas corpus record reproduced on appeal pursuant to Circuit Rule 17-1. RT designates references to the state trial transcript. Cir.R. 10-2(b).

3. One of the mental health experts had been retained specifically to assist in development of guilt phase defenses but after interviewing Caro found no mental disorders that could establish a defense. RT 5125, 5130, 5133-5134. Counsel decided not to "raise any guilt phase defense." RT 5125. Many years after trial the same expert, who no longer had any records from the case, nevertheless declared that had he known of the theories posited by posttrial experts he would have found sufficient mental deficiencies to establish a guilt phase defense for Caro.

The penalty phase of Caro's trial was heard, at his request, by a separate jury. In addition to the guilt phase testimony, the prosecution presented evidence of two prior uncharged murders,[4] a prior kidnapping conviction stemming from a forcible kidnap and rape, and two attempts to escape from jail. The prior rape victim testified in the penalty phase.

Caro "introduced extensive background and character evidence" in mitigation. *People v. Caro*, 46 Cal.3d 1035, 1052, 251 Cal.Rptr. 757, 767 (1988). Among the 17 witnesses called by defense counsel were Caro's parents, a brother, childhood and other friends, his high school coach, his ex-wife, his girlfriend, a job supervisor, and a vocational instructor from the state prison where Caro was incarcerated on the earlier kidnapping conviction. The defense also introduced a detailed history of Caro's life through a licensed clinical social worker and testimony from a clinical psychologist who had interviewed and tested Caro. The jury returned a sentence of death. Judgment was pronounced on January 5, 1982.

Caro's convictions and death sentence were affirmed by the California Supreme Court, which also considered two petitions for state habeas corpus relief. In his second state petition, filed in June 1992, Caro presented declarations from new experts who concluded, in part, that he might suffer from organic brain damage which might be tied to exposure to neurotoxic pesticides. The

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4. The jury was instructed that it must unanimously find beyond a reasonable doubt that Caro had committed the uncharged murders before that evidence could be considered as aggravation. In their verdict forms the jurors reported that they did not unanimously find Caro guilty of either murder and presumably followed the instruction not to consider those crimes in determining the appropriate penalty. The California Supreme Court observed that the unanimity instruction was not required by state law, thus providing Caro greater protection in the penalty phase than that to which he was entitled. *People v. Caro*, 46 Cal.3d 1035, 1057, 251 Cal.Rptr. 757, 771 (1988).

conclusions were based on examinations of Caro made ten to twelve years after the murders and without any expert expressly documenting an organic brain defect. These experts did not undertake to explain the relationship, if any, between such toxic exposure and the kidnapping, murders, and attempted murders for which Caro was convicted. Indeed, conspicuous by its absence was any reference in the expert declarations to Caro's crimes. Caro alleged that trial counsel was ineffective for failing to uncover and present evidence pertaining to neurotoxin exposure as mitigation. The claims were denied on the merits by the state supreme court without an evidentiary hearing in September 1993.

Caro then filed a federal habeas corpus petition in November 1993, again alleging *inter alia*, trial counsel was ineffective for not discovering and presenting as mitigation evidence that he allegedly suffered brain damage from neurotoxin exposure. His claim was based entirely on the declarations of his new, posttrial experts.[5] The District Court denied an evidentiary hearing, granted the State's motion for summary judgment, and denied the petition. It found that Caro's attacks on trial counsel were "too vague and ambiguous" to warrant relief. App. C at 46.

On appeal the Ninth Circuit unanimously denied several claims relating to the guilt determination in an unpublished memorandum decision.[6] In its published opinion, the circuit court panel held by a 2-1 vote that

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5. Caro later offered additional expert declarations that were not presented to the state supreme court. These included a psychiatrist who opined on the basis of an examination conducted more than 14 years after the murders that Caro suffered an organic brain disorder in part because he "has positive suck and positive snout responses." ER 7A: 1483.

6. Because that order is entirely separate from and unrelated to the issues presented by this petition, we have not included it in the appendix.

Caro was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel at the penalty trial.

The majority recognized "the sentencing jury was aware that Caro was beaten and suffered head injuries as a child. The jury also knew that Caro worked as a flagger in high school[7] and at an agricultural chemical company as an adult." App. A at 9. The majority also acknowledged that Caro had been examined by four experts prior to trial, but observed that "none of the experts were neurologists or toxicologists and none conducted the neurological testing needed to evaluate the effects that the pesticides and chemicals had on Caro's brain." App. A at 7.

According to the panel majority, Caro's attorney was obligated to conduct an investigation "which will allow a determination of what sort of experts to consult." App. A at 7. Counsel was also obligated to provide the experts with whom he did consult information necessary to "make an accurate evaluation of Caro's neurological system." App. A at 7. The panel complained that Caro's jury did not "have the benefit of expert testimony to explain the ramifications of [his] experiences on Caro's behavior," holding that "[e]xpert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone." App. A at 9. Because trial counsel did not consult with the correct experts and as a result failed to present "every piece of relevant evidence in mitigation," App. A at 10, the majority remanded to the district court for an evidentiary hearing "to determine whether [Caro] suffered brain damage as a result of his exposure to neurotoxicants and his personal background. If so, counsel's failure to investigate will have rendered the

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7. As a "flagger" Caro stood in the fields to indicate where the crop dusters should spray their pesticides. He wore no protective clothing and often came to school smelling of pesticide. App. A at 4. This evidence was known to the sentencing jury.

results of Caro's penalty phase trial unreliable." App. A at 12.

The dissenting panel judge concluded that Caro's trial counsel was entitled to rely upon the advice of the experts with whom he consulted, none of whom found brain damage or suggested the need for additional testing or experts. That new experts, years later, thought more could have been done did not establish deficient performance by counsel at the time of trial. App. A at 17-20. Moreover, the evidence of guilt and other criminal history, which "the majority pointedly avoid[ed] considering," App. A at 21, in light of the mitigation case which was presented, demonstrated that any lapse by counsel could not have been prejudicial. App. A at 20-25.

REASONS FOR GRANTING THE WRIT

Based on its concerns for comity, federalism, and finality, this Court has "found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief." *Thompson v. Calderon*, 118 S.Ct. 1489, 1500 (1998). Nowhere are those restraints more appropriate than in reviewing claims of ineffective assistance of counsel. Rarely will the Court see a more complete departure from its precedent than the panel decision in this case.

The Sixth Amendment right to counsel in criminal cases "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). "The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding . . . ." *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993). Thus, a state prisoner challenging trial counsel's action must prove both that his attorney's performance was deficient and that counsel's actions were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Judicial scrutiny of counsel's

performance must be highly deferential," *id.* at 689; must conduct an evaluation of counsel's actions "contemporary" with the time of trial, *Fretwell*, *supra* at 372; and must ultimately focus on whether the result of the trial was unreliable or the proceeding was fundamentally unfair. *Id.*. Unfortunately, as the dissenting panel judge noted, the majority in this case did "not take seriously the nature of [its] inquiry." App. A at 15. The Ninth Circuit decision is neither deferential nor contemporary and fails to consider the fundamental fairness of Caro's trial.

The panel majority held that trial counsel was obligated to have Caro examined by specific types of experts; that counsel was required to determine what information was necessary to allow the experts to accurately evaluate Caro; that the reasonableness of counsel's actions at trial are to be determined by reference to posttrial expert opinions; and that counsel was obligated to present particular expert testimony at trial. The panel majority also failed to evaluate any newly alleged mitigation in light of the evidence in aggravation and held that Caro need do no more than prove he suffered brain damage from exposure to neurotoxins to obtain a new penalty trial.

The Ninth Circuit opinion gravely skews the scope of trial counsel's duty to investigate and the consequences of any lapses by counsel. Those issues merits review by this Court.

A. Trial Counsel's Duty To Investigate

This Court emphasized in *Strickland* that "[j]udicial scrutiny of counsel's performance must be highly deferential," 466 U.S. at 689, and must focus on whether counsel's actions were "reasonable considering all the circumstances." *Id.* at 688. Counsel is "strongly presumed" to have rendered proper assistance and to have "made all

significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Counsel's actions must be examined in light of the facts of the case and as of the time counsel acted. *Id.*; *Fretwell*, 506 U.S. at 372 (emphasizing "rule of contemporary assessment").

Trial counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, *supra* at 691. While there is no bright-line rule defining the scope of investigation, an attorney's decision not to pursue a particular line of inquiry must be assessed in light of the circumstances of the case. *Id.* It is not enough to suggest that counsel could have conducted a more thorough investigation. *Burger v. Kemp*, 483 U.S. 776, 794 (1987). Rather, the defendant must demonstrate that the decision to forgo further investigation was unreasonable in light of the record as known to counsel at the time the decision was made. *Strickland*, *supra* at 691; *Burger*, *supra* at 794.

Caro's counsel had him examined by four mental health experts and none identified any organic brain defects or suggested any further tests that should be conducted in light of Caro's exposure to potentially toxic pesticides. Nonetheless, the Ninth Circuit panel majority concluded that trial counsel was required to conduct an investigation sufficient to determine the "correct" experts to consult. The "correct" experts, according to the circuit court, are those whom posttrial experts claim are necessary. App. A at 6 - 7. This conclusion is expressly contrary to the Court's precedent in at least three ways.

First, the circuit court assumed that an expert evaluation is a mandatory component of preparation for the penalty phase of a capital case. No decision of this Court supports such a rule. Indeed, trial counsel in *Strickland* did not request any psychiatric examination of his client, a decision this Court found to be reasonable under the circumstances. 466 U.S. at 699.

Second, this Court has never suggested that an effective investigation requires contact with any specific witnesses, much less particular types of experts. "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Addington v. Texas*, 441 U.S. 418, 430 (1979). It is entirely reasonable, therefore, for counsel to rely upon the opinions of the experts with whom he does consult to determine what, if any, additional investigation may be necessary. The expert, not the attorney, is expected to know what information is necessary to reach a diagnosis; any other approach would defeat the whole aim of having experts. Indeed, this Court has never held that any right to the assistance of mental health experts allows the defendant to choose any particular psychiatrist or to obtain more than one expert. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

Finally, the Ninth Circuit's reliance on the opinions of posttrial experts ignores the "rule of contemporary assessment." *Fretwell*, 506 U.S. at 372. It is hardly surprising, particularly in capital cases, for defendants to obtain declarations or other allegedly "new" information about the case. *See Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring). The opinions of new experts, or even the "new" opinions of old experts, obtained more than a decade after trial hardly suffice to establish that the decisions made at the time by trial counsel were unreasonable. To so hold, as does the Ninth Circuit in this case, eviscerates the contemporary assessment rule and expands trial counsel's obligation to investigate beyond any reasonable level. Indeed, an investigation can never be complete nor a judgment final so long as one new expert can suggest additional or alternative theories. *See Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (courts must be careful "not to narrow the wide range of conduct" acceptable under the Sixth Amendment).

The State recognizes that this Court does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). This is not, however, merely a case in which "a concededly correct view of the law was incorrectly applied to the facts . . . ." *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting). Rather, the Ninth Circuit panel's wholesale departure from this Court's jurisprudence on effective assistance of counsel has resulted in the creation of "a new constitutional rule under the Sixth Amendment." *Morris v. Slappy*, 461 U.S. 1, 14 (1983); *see Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) (a result not dictated by precedent existing when the conviction became final is barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989)). Review is appropriate to prevent the unwarranted and unprecedented expansion of the right to counsel created by the Ninth Circuit panel.

B. The Requirement Of Prejudice

Absent a complete failure to "subject the prosecution's case to meaningful adversarial testing," *United States v. Cronic*, 466 U.S. 648, 659 (1984), a circumstance clearly not applicable to Caro's case, the defendant must "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. When the challenge, as in this case, is to a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. Prejudice must be assessed under the totality of the evidence before the sentencer. *Id.*

Because the "touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding," *Fretwell*, 506 U.S. at 370, it is not enough to focus merely on outcome determination. Rather, a reviewing court must

consider "whether the result of the proceeding was fundamentally unfair or unreliable . . . ." *Id.* at 369-370. To do otherwise could result in a "windfall" to which the defendant was not entitled. *Id.*[8]

Once again the Ninth Circuit panel ignores the applicable precedent. The majority concludes that "every piece of relevant evidence in mitigation was not presented" at trial, App. A at 10, and assumes that alleged "chemical brain poisoning causing aggressive behavior" was the "single most important evidence of mitigation." App. A at 11.[9] Consequently, if Caro can prove at an evidentiary hearing that he suffered brain damage because of exposure to neurotoxic substances, the sentencing phase, according to the circuit court, was presumptively unreliable and Caro is entitled to a new penalty trial. App. A at 11-12.

In reaching this conclusion the majority completely ignored any mention, much less an analysis, of the evidence in aggravation. This included Caro's purposeful stalking of his young victims; his behavior luring the assault victims into a false sense of security before shooting them; his attempts to conceal his truck and alter his appearance after the murders; his prior kidnapping and rape of a young woman; and his multiple escape attempts. The panel also gave no consideration to the 17

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8. This Court granted certiorari on April 5, 1999, in *Williams v. Taylor*, No. 98-8384, in part to consider the meaning of the "windfall" language in *Fretwell*. 1999 WL 148296; *see Williams v. Taylor*, 163 F.3d 860 (4th Cir. 1998).

9. The toxic exposure testimony discussed by the Ninth Circuit was undoubtedly relevant mitigating evidence. That it would likely have been admitted had it been offered at trial, of course, does not establish that counsel's failure to discover the evidence demonstrates deficient performance or that its absence from the trial record compels reversal. *See Burger v. Kemp*, 483 U.S. at 789 n. 7. The panel majority betrays no understanding of this principle.

mitigation witnesses from whom the penalty jury did hear, including a psychologist and a clinical social worker who detailed Caro's life history. Given the overwhelming aggravation case and the extensive mitigation which was presented, it is simply impossible to characterize Caro's penalty phase as fundamentally unfair or his death verdict as unreliable simply because one additional expert was not called. A reversal under these circumstances can only be characterized as a "windfall."

The panel decision creates in effect a rule of per se reversal whenever evidence that a federal court views as significant many years after trial was not presented to the jury. That conclusion is wholly at odds with *Strickland*, does not satisfy the narrow test for presumptive unreliability in *Cronic*, and gives little more than lip service to *Fretwell*. Because the evidentiary hearing ordered by the circuit court cannot establish either deficient performance or prejudice, the State should not be put to the time and expense of once again defending its 17 year old judgment.

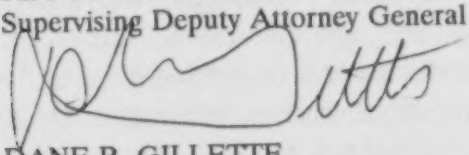
CONCLUSION

For the reasons stated above certiorari should be granted.

Dated: April 26, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General



DANE R. GILLETTE
Senior Assistant Attorney General
Counsel of Record

Counsel for Petitioner

DRG:pl
SF1993XW0007

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CERTIFICATE OF SERVICE BY MAIL

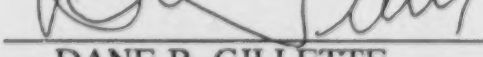
DANE R. GILLETTE, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 50 Fremont Street, Suite 300, in the City and County of San Francisco, State of California; that on April 28, 1999, he served three true copies of the Petition For Writ Of Certiorari and Appendix To Petition For Writ Of Certiorari in the above-entitled matter on the respondent and by placing same in envelopes addressed as follows:

Jeffrey L. Bleich
Munger, Tolles & Olson LLP
33 New Montgomery Tower
Nineteenth Floor
San Francisco, CA 94105

Lynne S. Coffin
Wendy C. Peoples
Coffin & Love
301 Pennsylvania
San Francisco, CA 94107

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.



DANE R. GILLETTE
Senior Assistant Attorney General